

STATE OF MICHIGAN
COURT OF APPEALS

ERVIN JAMES,

Plaintiff-Appellant,

v

HARBORTOWN DEVELOPMENT
PARTNERSHIP, ANR DEVELOPMENT
CORPORATION, a/k/a ANR DEVELOPMENT,
INC., MICHCON DEVELOPMENT
CORPORATION, and NATION WIDE
SECURITY, INC.,

Defendants-Appellees

and

DYRIS FRAZIER,

Defendant.

UNPUBLISHED

April 27, 2001

No. 215963

Wayne Circuit Court

LC No. 94-430110-NO

Before: Bandstra C.J., and Wilder and Collins, JJ.

PER CURIAM.

Plaintiff Ervin James appeals as of right a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This case is before this Court for the second time. Plaintiff was a tenant of the Harbortown Apartment Complex. His landlord was the Harbortown Development Partnership, whose co-partners are ANR Development Corporation, a/k/a ANR Development, Inc., and MichCon Development Corporation (hereinafter collectively referred to as defendants). The premises were monitored by Nation Wide Security, Inc., (Nation Wide) pursuant to a contract with defendants. In his complaint, plaintiff alleged that, while in the outer lobby of his apartment building, he was attacked by Nathaniel Gatewood, a guest of Harbortown tenant Dyris Frazier.¹

¹ Dyris Frazier was a named defendant in this lawsuit; however, the trial court dismissed the claims against her without prejudice because she was never served. That dismissal is not
(continued...)

Plaintiff's complaint asserted claims of negligence, nuisance, breach of contract, and breach of express and/or implied warranties against defendants. Following a hearing, the trial court granted summary disposition in favor of defendants, finding that landlords are not responsible for the criminal acts of third parties. The trial court subsequently denied plaintiff's motion for reconsideration.

Plaintiff appealed, arguing that the trial court improperly granted summary disposition because there was sufficient evidence to establish that defendants inadequately provided security on the premises, and the trial court failed to address his claims of breach of warranty and breach of contract. In an unpublished opinion, this Court affirmed the trial court's decision, in part, vacated it in part, and remanded for further proceedings. *James v Harbortown Development*, unpublished per curiam opinion of the Court of Appeals (issued August 14, 1998, Docket No. 194395). This Court held that the trial court did not err in summarily dismissing plaintiff's negligence claims; however, it vacated that portion of the trial court's order to the extent that it granted summary disposition to defendants on plaintiff's breach of warranty and breach of contract claims because neither defendants' motion for summary disposition nor the trial court specifically addressed these claims. The case was remanded to the trial court for consideration of those claims.

On remand, defendants filed a renewed motion for summary disposition, arguing that plaintiff's breach of warranty and breach of contract claims must fail because plaintiff failed to raise a genuine issue of material fact that defendants promised to keep him safe from unforeseeable criminal assaults. The trial court granted defendants' motion for summary disposition, holding that plaintiff failed to prove that defendants engaged in acts or omissions that took away plaintiff's beneficial use or enjoyment of the premises and, in any event, because plaintiff's injuries were the result of actions of a third party, with no connection to defendants, defendants did not breach the covenant of quiet enjoyment contained in the lease agreement. The trial court additionally held that neither Harbortown's brochure, nor its rules and regulations, established a warranty of safety. Finally, the trial court dismissed plaintiff's breach of contract claim, finding that plaintiff was not an intended beneficiary of the security agreement between Harbortown and Nation Wide.

In this appeal, plaintiff argues that the trial court erred in granting defendants' motion for summary disposition on his breach of warranty and breach of contract claims. This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must consider the pleadings, affidavits, admissions and any other documentary evidence in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *Id.*

Plaintiff argues that summary disposition in favor of defendants on his breach of warranty claim was improper for three reasons. First, plaintiff asserts that defendants breached the covenant of quiet enjoyment contained in the lease agreement. We disagree.

(...continued)

challenged on appeal.

Paragraph 20 of Harbortown's lease agreement provides:

QUIET ENJOYMENT

20. Landlord covenants and agrees that upon Tenant paying said rent and performing all the covenants and conditions of Tenant's part to be performed that Tenant shall and may peaceably and quietly have, hold and enjoy the apartment for the term aforesaid subject, however, to the terms of this Lease.

The conditions that satisfy a breach of the covenant of quiet enjoyment are outlined in 49 Am Jur 2d, Landlord and Tenant §§ 601, 606:

The covenant of quiet enjoyment is breached when the landlord obstructs, interferes with, or takes away from the tenant in a substantial degree the beneficial use of the leasehold.

* * *

The covenant of quiet enjoyment is breached by any disturbance of the tenant's possession by the landlord which renders the premises unfit for occupancy for the purposes for which they were leased, or which deprives the tenant of the beneficial enjoyment of the premises.

* * *

In order for liability to be imposed, however, it must appear that the landlord is responsible for the unlawful act, or it must appear that the landlord sanctioned or directed it, or was the source of authority by which another interrupted the tenant's enjoyment. [Citations omitted.]

In this case, plaintiffs failed to establish that defendants obstructed or interfered with plaintiff's beneficial use and enjoyment of the leasehold. Indeed, plaintiff's injuries were inflicted by a third party on the premises, who had no connection to defendants and over whom defendants had no control. Thus, because defendants were not responsible for the unlawful act, and did not sanction or direct the conduct which allegedly interrupted plaintiff's enjoyment of his leasehold, we reject plaintiff's claim that defendants breached the covenant of quiet enjoyment.

Second, plaintiff claims that Harbortown's advertisement brochure created a warranty regarding the safety of the apartment complex. We disagree. Plaintiff relies on *Soderberg v Detroit Bank & Trust Co*, 126 Mich App 474; 337 NW2d 364 (1983), as support for the proposition that an advertisement brochure can support a breach of warranty claim. In *Soderberg*, the plaintiff's stamp collection was damaged due to a flood at the defendant bank. *Id.* at 476. The advertisement at issue read: "With a safe deposit box you not only guard against lapses in memory so common in times of crises, but you provide night and day protection for your valuables against theft, burning, misplacement and all other hazards." *Id.* at 481. The brochure included a list of items deserving such protection, including rare stamps. *Id.* This Court held that a warranty was clear from the language of the advertisement.

In contrast, the Harbortown brochure did not clearly establish a warranty of safety. Rather, the brochure lists a number of features and amenities provided by the apartment complex. With respect to the safety features offered, the brochure listed an “individually monitored security system” and a “24-hour manned gatehouse security.” Plaintiff asserts that Harbortown’s brochure lulled him into a false sense of security; however, the language in the brochure was insufficient to create a warranty of safety. Moreover, plaintiff did not allege that defendants failed to provide the safety features and services explicitly promised in its brochure, i.e., an individually monitored security system and 24-hour manned gatehouse security. See *Scott v Harper Recreation*, 444 Mich 441, 443; 506 NW2d 857 (1993). Therefore, we reject plaintiff’s argument.

Plaintiff’s third argument in support of his breach of warranty claim is that he was assaulted because defendants failed to enforce their internal rules regarding subletting, loitering and admission of visitors, and failed to ensure that the security personnel adequately patrolled the area. These allegations, however, sound in negligence rather than breach of warranty, and were already raised and rejected by this Court in its prior opinion wherein this Court held that “there is no evidence that would reasonably support the conclusion that defendants negligently performed the narrow security duties which they voluntarily assumed.” *James v Harbortown Development*, unpublished per curiam opinion of the Court of Appeals (issued August 14, 1998, Docket No. 194395).² Therefore, we are bound under the law of the case doctrine to adhere to this Court’s prior ruling on this legal issue and we decline to consider the issue anew. *Everett v Nickola*, 234 Mich App 632, 635; 599 NW2d 732 (1999) (“if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same”).³ For these reasons, the trial court did not err in granting defendants’ motion for summary disposition on plaintiff’s breach of warranty claim.

Plaintiff next contends that the trial court erred in granting summary disposition to defendants on his breach of contract claim because he was a third-party beneficiary of the contract between Harbortown and Nation Wide. We disagree. Third-party beneficiary status is governed by MCL 600.1405; MSA 27A.1405, which provides:

² We additionally note that whether defendants adhered to their own rules and regulations governing the management of their business is irrelevant. A person cannot, by the adoption of private rules, fix the standard of his duty to others. This duty is fixed by law and whether a certain course of conduct is negligent or consistent with the exercise of reasonable care must be determined by the standard fixed by law, without regard to private rules of the party. *McKernan v Detroit Citizen Street RR Co*, 138 Mich 519, 540; 101 NW 812 (1904); *Gallagher v Detroit-Macomb Hosp Ass’n*, 171 Mich App 761, 764-766; 431 NW2d 90 (1988).

³ In any event, after independently reviewing the record, we agree with this Court’s prior ruling, dismissing plaintiff’s negligence claims on grounds that defendants cannot be held responsible for the unforeseeable criminal conduct of third parties simply because the security measures provided were less effective than they could have been. See *Scott v Harper Recreation*, 444 Mich 441, 450; 506 NW2d 857 (1993); *Krass v Tri-County Security, Inc*, 233 Mich App 661, 684; 593 NW2d 578 (1999).

Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

In *Dynamic Construction Co v Barton Malow Co*, 214 Mich App 425, 427-428; 543 NW2d 31 (1995), this Court said:

When determining whether the parties to the contract intended to make a third person a third-party beneficiary, a court should examine the contract using an objective standard. Third-party beneficiary status requires an express promise to act to the benefit of the third party; where no such promise exists, that third party cannot maintain an action for breach of the contract. Thus, a person who incidentally benefits from the performance of some duty required under a contract has no rights under the contract. [Citations omitted.]

Plaintiff claims that the following language in the contract between Harbortown and Nation Wide establishes that he was an intended third-party beneficiary of the contract: Nation Wide agrees “to provide all necessary uniformed security officers to perform security services for Company at Company’s Harbortown Development in Detroit, Michigan.” Contrary to plaintiff’s contention, however, this language is clearly for the primary benefit of Harbortown and Nation Wide and does not indicate that the parties undertook a duty to do anything directly for the benefit of plaintiff or other tenants. Further, the language “[c]ompany’s overall objective is to provide a safe environment for employees, tenants, invitees, residents and contractors on property” comes from an attachment to the contract between Harbortown and Nation Wide under the heading of General Objectives. While this may indeed be the overall goal of the contract between Harbortown and Nation Wide, the specific obligations of Nation Wide were enumerated in the contract, which contains no mention of Harbortown residents being the beneficiary of these tasks. Finally, the contract between Harbortown and Nation Wide provides on page 5:

It is expressly understood that this Agreement is entered into solely for the mutual benefit of Contractor and Company and its subsidiaries, and that no benefits, rights, duties or obligations inure to any party other than those signatory hereto.

It is clear from the unambiguous language in the contract that the primary intent of the contract between Harbortown and Nation Wide was to protect Harbortown’s property. While plaintiff may have derived some benefit from this agreement, we conclude that plaintiff was an incidental beneficiary at best. *Dynamics Construction Co*, *supra* at 427-428. Plaintiff cannot maintain an action for breach of the contract between Harbortown and Nation Wide merely because he may have received an incidental benefit from its performance. *Id* at 428. Accordingly, the trial court did not err by summarily dismissing plaintiff’s breach of contract claim.

Affirmed.

/s/ Richard A. Bandstra

/s/ Kurtis T. Wilder

/s/ Jeffrey G. Collins